Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES

MARCH TERM, 1977
NO. ~~76~~-1318

* *

SEARS WILLIAM SAULS, PETITIONER

vs.

STATE OF NORTH CAROLINA, RESPONDENT

* *

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

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IN THE
SUPREME COURT OF THE UNITED STATES

MARCH TERM, 1977
No. _____

SEARS WILLIAM SAULS, Petitioner

vs.

STATE OF NORTH CAROLINA, Respondent

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF
NORTH CAROLINA

The petitioner, Sears William Sauls, respectfully petitions the Supreme Court of the United States to issue its writ of certiorari to the Supreme Court of North Carolina to the end that this Court may review the decision of the Supreme Court of North Carolina reversing the North Carolina Court of Appeals acquittal of the petitioner on charges of being an accessory before the fact to forgery and to uttering forged checks and in reimposing upon him the trial court's sentence of imprisonment, and also to review the decision of the Supreme Court of North Carolina in denying without hearing or evidentiary hearing his motions for relief on account of the use of perjured testimony to obtain his conviction and the use of threats and coercion to prevent essential testimony on his behalf.

OPINIONS BELOW

The opinion of the North Carolina Court of Appeals which acquitted the defendant of the charges against him appears as follows:

Number Below: 7518SC1018

Citation: STATE v. SAULS, 29 N.C. App. 457, 224 S.E. 2d 702, filed May 19, 1976.
(Copy appears hereinafter as pages 23 - 28 .)

The opinion of the Supreme Court of North Carolina which reversed his acquittal by the North Carolina Court of Appeals and which is sought to be reviewed here appears as follows:

Number Below: 54

Citation: STATE v. SAULS, 291 N.C. 253, 230 S.E. 2d 390, filed December 7, 1976.
(Copy appears hereinafter as pages 29 - 40 .)

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3).

The date of the judgment of the Supreme Court of North Carolina sought to be reviewed and the date of its entry is December 27, 1976.

The date of its denial of petitioner's motion for relief which is sought to be reviewed and the date of its entry is February 3, 1977.

No rehearing in this criminal case is available in North Carolina.

Petitioner is at liberty on bail pending final determination of this case.

Petitioner contends that his original conviction in the trial court was procured by the use of perjured testimony; that his motion for new trial on that grounds in the trial court was frustrated and denied because threats and coercion by the State, which were condoned by the trial court, against his witness prevented her from testifying and establishing that the petitioner was in fact innocent and had been in fact convicted upon perjured testimony, all in violation of his rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution; that thereafter he was acquitted, on appeal, of the charges against him by the North Carolina Court of Appeals; that thereafter, in violation of his rights under the Fifth Amendment and the Due Process Clause of the Fourteenth Amendment of the United States Constitution the Supreme Court of North Carolina reversed his acquittal, subjecting him to double jeopardy; that thereafter, in violation of his rights under the Fifth Amendment and the Due Process Clause of the Fourteenth Amendment to the United States Constitution the Supreme Court of North Carolina denied, without hearing or evidentiary hearing, his motion for relief based on the violations of his rights set forth above.

QUESTIONS PRESENTED

1. Was the petitioner convicted in the trial court by the use of perjured testimony in violation of his rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution?

2. Were the petitioner's rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution violated in the trial court when, upon his motion for new trial on account of the use of perjured testimony against him, the State used, and the trial court condoned, threats against his witness to prevent her from testifying to facts showing that he was in fact innocent and that he had in fact been convicted upon perjured testimony so that his motion for new trial was frustrated and denied?

3. Were the petitioner's rights under the Fifth Amendment and under the Due Process Clause to the Fourteenth Amendment to the United States Constitution violated and was he subjected to double jeopardy when, after he was acquitted on appeal by the North Carolina Court of Appeals, which allowed his motions for judgment as of nonsuit (dismissal for lack of evidence against him) the State appealed and the North Carolina Supreme Court reversed his acquittal and reimposed active sentence upon him, especially in view of the established law of North Carolina that the State could not appeal from his acquittal by allowance of his motion for judgment as of nonsuit by the North Carolina Court of Appeals?

4. Were the petitioner's rights under the Fifth Amendment and under the Due Process Clause of the Fourteenth Amendment to the United States Constitution violated when the Supreme Court denied without hearing and without evidentiary hearing his motion for relief on account of the foregoing violations of his rights?

PROVISIONS OF THE UNITED STATES CONSTITUTION INVOLVED

Fifth Amendment to the Constitution of the United States:

> "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

Due Process Clause, Fourteenth Amendment to the Constitution of the United States:

> "1. All persons born or naturalized in the United States, and subject to the jurisdiction

> thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the Unites States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

On January 3, 1977, the petitioner filed in the Supreme Court of North Carolina the following motions which set forth and show concisely the facts material to the questions presented:

GENERAL COURT OF JUSTICE
STATE OF NORTH CAROLINA
IN THE SUPREME COURT OF NORTH CAROLINA
FALL TERM 1976
NO. 7518SC1018

STATE OF NORTH CAROLINA	No. 54, Eighteenth District
v.	
SEARS WILLIAM SAULS	From Guilford

Motion for Relief from Judgment and Commitment under the Inherent and Supervisory Powers of the Supreme Court of North Carolina and Motions for Stay of Execution and of Enforcement of Judgment and Commitment.

In the alternative, Motion for Stay of Execution and of Enforcement of Judgment and Commitment pending Petition for Certiorari to the Supreme Court of the United States.

To the Honorable Supreme Court of North Carolina:

Sears William Sauls, the defendant in the above titled action, respectfully moves and petitions this court as follows:

1. Under its inherent and supervisory powers and duties over and with respect to the courts of North Carolina to set aside that judgment and commitment in this case of the Honorable Harvey A. Lupton, Judge of Superior Court, dated July 10, 1975, which decrees that this defendant be imprisoned for a term of three years in the State Prison; or, in the alternative to direct the Superior Court of Guilford County to conduct appropriate hearings and to make appropriate findings of fact, conclusion of law and determinations with respect to this defendant's motion that said judgment and commitment of imprisonment be set aside.

2. Pending this Court's consideration of and determination of defendant's motion and prayer for relief as set forth in paragraph 1, above, to stay the execution and enforcement of said judgment and commitment of imprisonment.

3. In the alternative, if the relief prayed in paragraphs 1 and 2, above, be not granted by this Court, to stay said judgment and commitment of imprisonment pending the final determination of

this defendant's petition to the Supreme Court of the United States for a writ of certiorari to review the decisions of this Court in this case.

Facts

Reference is made to the record of this case on file with this Court.

On February 3, 1975, the defendant was charged in a bill of indictment in the Superior Court of Guilford County with the felonies of (1) forgery of a bank check and (2) uttering the forged check, all allegedly on November 28, 1973. (R.p. 2)

During the May 5, 1975 Criminal Session of the Superior Court of Guilford County, the defendant was tried on those charges before the Honorable Robert Collier and a jury. (R.pp. 1, 3, 122, 123)

At the close of the State's evidence (R.p. 58) and of all the evidence (R.p. 65), the defendant made appropriate motions for judgment as of nonsuit as to each charge against him (equivalent to Motions to dismiss the charges against him and to find him not guilty thereof for the lack of sufficient evidence to sustain a conviction) and reserved appropriate exceptions to the denial of his Motions.

The jury by its verdict found the defendant guilty of (a) accessory before the fact of forgery, and (b) accessory before the fact of uttering a forged instrument. (R.p. 123)

Defendant then moved that the verdict be set aside as being contrary to the evidence. The

motion was denied, and the defendant reserved an appropriate exception. (R.p. 81)

Judge Collier then continued prayer for judgment in the case until the June 25, 1975, session of the Superior Court of Guilford County. (R.p. 81)

In the defendant's trial before Judge Collier and a jury the State offered in evidence the false and perjured evidence of Edward George Busby and of Ronald Lee McVey, who perjuriously and falsely testified in effect that: they had obtained from a man named Frazier in Virginia stolen credit cards, stolen drivers licenses and the stolen checks used in the forgeries involved in the defendant's case; that Frazier directed them to see the defendant in Greensboro, North Carolina, for help in obtaining North Carolina driver's licenses to be used as identification in cashing the stolen checks in North Carolina; that in November 1973 they did, along with a woman helping them in the scheme, one Charlene Handy, alias Joyce Parker, see the defendant in Greensboro, North Carolina, showing the defendant the stolen credit cards and driver's licenses they received from Frazier; that they told the defendant that they needed a car in which to take driver's license tests and to secure driver's licenses in fictitious names in order to use the driver's licenses as identification in cashing checks; that defendant loaned them a car to use for that purpose, and gave them directions to the driver's license bureau; that they were successful in procuring driver's licenses in the fictitious names appearing on a credit card and on a driver's license

received from Frazier; that after doing so they told the defendant that the patrolman who gave them their driver's license tests took down the license number of the car loaned to them by the defendant; that the defendant assured them that he would cover up for them if anything came up about that; that thereafter they cashed numerous forged checks using their North Carolina drivers' licenses for identification; that they gave the defendant $2,000.00 for the help he gave them in getting the drivers' licenses; that, thereafter, about December 11, 1973, the defendant called Busby and warned him that the F.B.I. had investigated the car he had loaned them, that the F.B.I. knew who they were, and that they had "better split" (R.pp. 3-22, 24-53).

The testimony by Busby and McVey, was the basis of the case against the defendant and the basis of his conviction.

On or about May 26, 1975, after defendant's conviction on that perjured testimony, but before the defendant was scheduled to be sentenced on June 25, 1975, Charlene Handy, the woman confederate of the two State's witnesses (Busby and McVey), who was then serving a term in North Carolina's Woman's Prison, contacted the defendant's counsel, Mr. W. Marcus Short, and truthfully told him that the testimony by Busby and McVey was false; that there was no such person as the Frazier from whom they related having received the stolen checks; that they (Busby and McVey) themselves stole the checks; that they borrowed a car from the defendant, but that the defendant knew nothing about the stolen and forged checks; that no

money was given to the defendant except money lawfully paid to him for the purchase of cars; that she, Busby and McVey divided among themselves the money received from the stolen and forged checks; that Busby and McVey told her that they fabricated the testimony about a person named Frazier and about the defendant's knowledge of and cooperation in their scheme to cash stolen checks in order to be able to trade their false testimony against the defendant to obtain more lenient sentences for themselves; and that she would willingly so testify on behalf of the defendant upon his motion to set aside his verdict of conviction and to obtain a new trial on the grounds of this newly discovered evidence.

On June 25, 1975, in the Superior Court of Guilford County, before Judge Collier, at the time set for him to be sentenced, the defendant appeared and moved that the verdict against him be set aside and that he be granted a new trial on the grounds of newly discovered evidence (as revealed to his counsel by Charlene Handy, above). (R.p. 81)

Present in Court were Charlene Handy (as a prospective witness for the defendant), the presiding judge, the defendant, counsel for the defendant, the prosecuting district attorney, and the commanding officer of the detective division of the Greensboro, North Carolina Police Department, who was in charge of the investigation in the defendant's case, Captain William Jackson, and others. Before Charlene Handy testified on behalf of the defendant, Captain Jackson threatened her in open court in the presence of the presiding

judge and in the presence of the prosecuting district attorney, stating to Charlene Handy that if she testified on the defendant's behalf to the facts she had given to defendant's counsel, he would see that she was prosecuted for perjury. He thereby so intimidated the witness, Charlene Handy, in the presence of the trial judge and of the prosecuting attorney that she was frightened and declined to testify to the truth out of fear of prosecution by the State of North Carolina. Nothing was done by the prosecution nor by the Court to relieve Charlene Handy of those threats and fears. On the contrary, the Court and the prosecution allowed and condoned the threats and intimidation.

Judge Collier denied the defendant's motion to set aside his conviction and to grant him a new trial on the grounds of newly discovered evidence, and the defendant reserved an appropriate exception. (R.p. 95).

Judge Collier then continued prayer for judgment in the case to the July 7, 1975, session of the Superior Court of Guilford County before Judge Lupton. (R.pp. 95, 96).

On July 7, 1975, defendant appeared before Judge Lupton and moved that his conviction be set aside and that he be granted a new trial on the grounds of newly discovered evidence, and requested the judge to hear and consider other newly discovered evidence. Judge Lupton denied the motion. Defendant reserved appropriate exceptions. (R.p. 96).

Thereafter, on July 10, 1975, Judge Lupton entered judgment and commitment imposing a three-year prison sentence upon the defendant. (R.pp. 122, 123).

Defendant reserved appropriate exceptions and appealed to the North Carolina Court of Appeals(R.pp. 123, 124).

On May 19, 1976, the North Carolina Court of Appeals reversed the defendant's conviction and the judgment and commitment by Judge Lupton, allowing the defendant's motions for judgment as of nonsuit which had been made at the close of the State's evidence and at the close of all of the evidence in his jury trial before Judge Collier, which constituted an acquittal of the defendant. (See opinion of the N. C. Court of Appeals in this case in the record and as reported at 29 N.C. App. 457; 224 S.E. 2d 702.)

The State of North Carolina appealed to the North Carolina Supreme Court from the ruling of the North Carolina Court of Appeals acquitting the defendant of the charges against him.

On December 7, 1976, the Supeme Court of North Carolina filed an opinion reversing the ruling of the North Carolina Court of Appeals and again subjected the defendant to the three-year prison sentence.

Reasons the Supreme Court of North Carolina Should Grant the Relief Prayer in Paragraphs Numbers 1, 2 and 3, above:

A. When the North Carolina Court of Appeals allowed the defendant's motions for judgment as of nonsuit as to the charges against the defendant upon the grounds that there was not sufficient evidence to sustain his conviction, that constituted an acquittal of the defendant upon those charges as completely as if the motions had been allowed in the trial court.

The State's appeal therefrom and this Court's reversal of the ruling of the North Carolina Court of Appeals is violative of the defendant's rights under:

(a) Chapter 15, Section 179 (G.S. 15-179) of the General Statutes of North Carolina which limits the right of the State in criminal cases so that the State may not appeal from the allowance of judgment as in the case of nonsuit, which constitutes an acquittal of the defendant. See State v. Vaughn, 168 N.C. 105, 150 S.E.2d 31 (1966).

(b) Article I, Section 19 of the North Carolina Constitution which guarantees the defendant against the loss of liberty but by the law of the land and without due process of law, and which guarantees the defendant against being twice placed in jeopardy (which was done when this Court reinstated his prison sentence after he was acquitted by action of the North Carolina Court of Appeals).

(c) The Fifth and Fourteenth Amendments to the United States Constitution which guarantee the defendant against being twice put in jeopardy for the same offense and against being deprived of liberty without due process of law.

B. The State's use of the false and perjured testimony of the witnesses Busby and McVey, and the State's depriving the defendant of evidence which would entitle him to a new trial on his motions to set aside his conviction and to grant him a new trial on the ground of newly discovered evidence by the oppressive means (in the presence of and condoned by the Court) of threatening and frightening his witness, Charlene Handy, so that she feared to and would not testify truthfully on his behalf violated the defendant's rights under:

(a) Article I, Section 19 of the North Carolina Constitution which guarantees the defendant against loss of liberty but by the law of the land and without due process.

(b) The Fifth and Fourteenth Amendments to the United States Constitution which guarantee the defendant against the loss of his liberty without due process of law.

C. In the event the Supreme Court of North Carolina does not grant to the defendant the relief prayed in 1 and 2 above, the defendant desires to, intends to, and will petition the Supreme Court of the United States to grant and issue its Writ of Certiorari to this Court in order that the United States Supreme Court may review the constitutionality of the trial, conviction, and imprisonment of the defendant and of the decisions of this Court with respect thereto, and particularly in view of the Fifth and Fourteenth Amendments to the United States Constitution.

Wherefore, in the event this Court does not grant the relief prayed in paragraphs numbered 1 and 2 above, this defendant respectfully petitions and moves this Court to grant a stay of the execution and enforcement of the judgment, commitment and prison sentence imposed by the Honorable Harvey A. Lupton, Judge Presiding, on July 10, 1975, until such time as the defendant may duly and in a timely manner petition the Supreme Court of the United States for a Writ of Certiorari and until the petition may have been duly and finally acted upon.

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CERTIFICATE OF SERVICE

I, Robert S. Cahoon, Attorney for the defendant, hereby certify that a copy of the foregoing motions and petition was this day served upon the Honorable Rufus Edmisten, Attorney General for the State of North Carolina, and upon the Honorable Archie Anders, Assistant Attorney General for the State of North Carolina, by leaving a copy thereof at their office with an employee, one of their secretaries, in their office at the N. C. Department of Justice, Justice Building, Raleigh, North Carolina, and by mailing to them via the United States mail a copy of the same at the same address and to their Post Office Box Number 25201, Raleigh, North Carolina 27611, with correct address and correct postage affixed.

This 3rd day of January 1977.

s/ Robert S. Cahoon
Attorney for Defendant.

NORTH CAROLINA
GUILFORD COUNTY

I, Sears William Sauls, being first duly sworn, depose and say:

That I am defendant in the foregoing case, that I have read the foregoing and attached motions and

know its contents; that same is true of my personal knowledge except those matters and things therein alleged upon information and belief, and as to those I am informed and verily believe it to be true.

s/ Sears Sauls

Subscribed and sworn to before me,
this 3 day of January, 1977.

s/ Patricia M. Rice
Notary Public

My Commission Expires: 1-9-80

(SEAL AFFIXED)

On February 3, 1977, the Supreme Court of North Carolina ruled on the petitioner's motions as follows:

(Filed February 3, 2:24 P.M., 1977, in the Office of Clerk of Supreme Court of North Carolina)

No. 54 EIGHTEENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA
Fall Term 1976

STATE OF NORTH CAROLINA
v. From Guilford
Sears William Sauls

ORDER FOR STAY OF EXECUTION

Defendant above named having been convicted of the felonies of accessory before the fact of forgery and accessory before the fact to uttering a forged instrument, and petition having been filed by defendant, through his attorneys, W. Marcus Short, William C. Ray, and Robert S. Cohoon of Greensboro, North Carolina and Nick Galifianakis of Durham, North Carolina, for a stay of execution of the judgment rendered by the Honorable Robert Collier at the May 5, 1976 criminal session of Guilford County Superior Court, which judgment upon appeal was affirmed by this court in its opinion filed December 7, 1976, and the defendant, through his attorneys, having stated his intention to file a petition for writ of certiorari in the Supreme Court of the United States, and having posted a secured bond in the amount of $15,000.00 for his appearance in the Guilford County Superior Court;

NOW, THEREFORE, it is ordered that the execution of the judgment of the Superior Court of Guilford County heretofore mentioned, which was affirmed upon appeal by this court, be and the same is hereby stayed, unless vacated earlier by further orders of this court, until the session of Superior Court of Guilford County next following the certification by the Supreme Court of North Carolina of the denial by the Supreme Court of the United States of the petition for certiorari if the same is denied, or until the session next following the certification

by the Supreme Court of North Carolina of the final determination of the Supreme Court of the United States if the petition for certiorari is allowed.

Defendant shall file his petition for certiorari with the Supreme Court of the United States within ninety days (90 days) from and after December 27, 1976. Upon filing his petition for writ of certiorari with the Supreme Court of the United States, defendant shall file proof of such filing with the Clerk of the Supreme Court of North Carolina. Upon the defendant's failure to file such a proof with the Clerk of this court within 90 days from and after December 27, 1976, this stay is revoked.

Defendant shall file a copy of his petition to the Supreme Court of the United States with the Attorney General of North Carolina.

This 3rd day of February 1977.

s/ Susie Sharp
Chief Justice of the Supreme
Court of North Carolina.

How Federal Questions Were Raised

In Supreme Court of North Carolina by assignments of error, and by the motions, set forth hereinbefore, presented to the North Carolina Supreme Court on January 3, 1977. The ruling (denial without consideration or hearing) appears in the North Carolina Supreme Court's Order for Stay of Execution set forth hereinbefore.

REASONS FOR GRANTING WRIT OF CERTIORARI

The petitioner's reasons for granting the writ of certiorari are the same as those asserted in his motions for relief in the Supreme Court of North Carolina set forth in full hereinbefore. To avoid needless repetition reference is made thereto.

It is respectfully submitted that the facts and reasons there set forth show clear, flagrant and prejudicial violations of petitioner's rights under the provisions of the Fifth Amendment and under the Due Process Clause of the Fourteenth Amendment to the United States Constitution; that the federal questions decided by the North Carolina Supreme Court are substantial, and are decided in a way not in accord with decisions of the United States Supreme Court.

Complete copies of the applicable opinions of the North Carolina Court of Appeals and of the North Carolina Supreme Court, including full captions, case numbers, and date of entry are attached.

Respectfully submitted,

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Attorneys for Petitioner

CERTIFICATE OF SERVICE

I, Robert S. Cahoon, Attorney for the defendant, hereby certify that a copy of the foregoing Petition for Writ of Certiorari to the Supreme Court of North Carolina was this day served upon the Clerk of the Supreme Court of North Carolina, and upon the Honorable Rufus Edmisten, Attorney General for the State of North Carolina, by mailing to them via the United States mail a copy of the same to their offices at the North Carolina Department of Justice, Justice Building, Raleigh, North Carolina, with correct address and correct postage affixed.

This 24th day of March, 1977.

Robert S. Cahoon

Robert S. Cahoon
Attorney for Defendant

STATE OF NORTH CAROLINA v. SEARS WILLIAM SAULS

No. 7518SC1018

(Filed 19 May 1976)

1. Criminal Law § 10— accessory before the fact — elements

The crime of accessory before the fact is a common law offense, and its necessary elements are that: (1) the defendant counseled, procured or commanded the principal to commit the offense, (2) he was not present when the offense was committed, and (3) the principal committed the crime.

2. Forgery § 2— forging and uttering forged check — accessory before the fact — insufficiency of evidence

In a prosecution for accessory before the fact to forgery and uttering a forged check, evidence was insufficient for the jury where it tended to show that the principals went to defendant and informed him that they needed to get a N. C. driver's license in a fictitious name in order to cash checks, defendant told them the requirements for obtaining a license and the location of the licensing office, defendant loaned the principals a car to drive to the license bureau, the principals obtained licenses and then forged a check for $2100, on the next day the principals returned to defendant's place of business, paid him cash for two used cars, and handed him $2000, nothing was said when the $2000 was passed, and defendant pocketed the money.

Judge PARKER dissenting.

APPEAL by defendant from *Collier, Judge*. Judgment entered 10 July 1975 in Superior Court, GUILFORD County. Heard in the Court of Appeals 5 April 1976.

In a bill of indictment it was charged that on 28 November 1973 the defendant (1) forged a check in the sum of $2,100.00 drawn on the trust account of Hoyle, Hoyle and Boone, Attorneys at Law, and (2) uttered the forged check.

The State elected to try the defendant on the charges of (1) accessory before the fact to forgery, and (2) accessory before the fact to uttering. The jury found the defendant guilty of both crimes; Judge Collier deferred sentence pending probation report; from judgment imposing imprisonment, defendant appeals.

Attorney General Edmisten by Assistant Attorney General Archie W. Anders for the State.

William C. Ray for defendant appellant.

CLARK, Judge.

The crime of accessory before the fact to the crime charged in an original indictment is a lesser included offense. *State v. Simons*, 179 N.C. 700, 103 S.E. 5 (1920); *Richardson v. Ross*, 310 F. Supp. 134 (E.D.N.C. 1970). The State having elected to proceed on the charges of accessory before the fact to the principal charges in the indictment, the trial court properly submitted to the jury these lesser offenses.

G.S. 14-5 provides in part as follows: "If any person shall *counsel, procure,* or *command* any other person to commit any felony . . . the person . . . shall be guilty of a felony . . . . " (Emphasis added.)

[1] The crime of accessory before the fact is a common law offense. In this State the necessary elements of the crime are: (1) that the defendant counseled, procured, or commanded the principal to commit the offense; (2) that he was not present when the offense was committed; and (3) that the principal

committed the crime. *State v. Bass*, 255 N.C. 42, 120 S.E. 2d 580 (1961).

A defendant may be tried and convicted as a principal in the first degree as the actual perpetrator of the offense, or as a principal in the second degree as an aider or abettor of the perpetrator, in which case he must be actually or constructively present. *State v. Bell*, 270 N.C. 25, 153 S.E. 2d 741 (1967); *State v. Buie*, 26 N.C. App. 151, 215 S.E. 2d 401 (1975). If not present either actually or constructively, he may be tried and convicted of accessory before the fact to the principal charge, which is a lesser offense thereof. "Thus, ordinarily, the only distinction between a principal and an accessory before the fact is that the latter was not present when the crime was actually committed." *State v. Benton*, 276 N.C. 641, 653, 174 S.E. 2d 793, 801 (1970). However, an examination of the decision leads to the conclusion that presence at the scene of the crime and little else is sufficient to constitute "aiding and abetting," *i.e.*, under some circumstances mere presence plus friendship with the perpetrator. But for a defendant, not actually or constructively present at the scene, to be criminally responsible for the acts of others as an accessory before the fact, it must be shown that he counseled, or procured, or commanded the others to perpetrate the crime. An accessory before the fact has been described as one who furnishes the means to carry on the crime, whose acts bring about the crime through the agency of or in connection with the perpetrators, who is a confederate, who instigates a crime. See 22 C.J.S., Criminal Law, § 90.

[2] The evidence for the State in the present case tends to show that Edward George Busby and Ronald McVey, in the car sales business at Portsmouth, Virginia, purchased some printed checks and identification cards from a "Mr. Frazier." The check in question apparently had been stolen from the law office of Hoyle, Hoyle and Boone, without the knowledge of any member of the firm. Busby had previously known for over a year the defendant Sauls, who was employed as a used car salesman in Greensboro. They went to see defendant and told him they were there to get a North Carolina driver's license in a fictitious name to be used in cashing checks. Defendant told them to get the license they would have to show identification and take a written test and explained to them where to go to get the license. At their request defendant let them use a car on

the lot to go to the licensing office. Busby and McVey then left, went to the licensing office, and each obtained a North Carolina driver's license to correspond to the names on two identification cards. They went to Portsmouth, spent the night and returned to Greensboro the following day. They typed in on the $2,100.00 check drawn on the Trust Account of Hoyle, Hoyle and Boone the name Hugh Harrison as payee to correspond to the name on the North Carolina driver's license issued to McVey, who cashed the check at a branch of First Union National Bank. They forged and cashed other checks. They then went to the automobile sales lot where defendant worked; Busby bought and paid cash to him for two used cars and at the same time McVey handed him $2,000.00 cash; defendant gave the money for the cars to the manager and stuck the $2,000.00 in his pocket. Neither McVey nor defendant said anything when the $2,000.00 was passed.

Considering this evidence in the light most favorable to the State, we find that there is not sufficient evidence to carry the case to the jury on either charge of accessory before the fact. The plan to commit the crime was conceived by Busby and McVey. Defendant did little more than tell them where and what they would have to do to obtain a North Carolina driver's license. There was no evidence that defendant was shown the check in question, or that he was told how when or where this check would be forged and uttered, or that he thereafter advised or counseled them in any way or planned to share in the money obtained by them in cashing the $2,100.00 forged check or any other forged checks. Nothing was said when McVey gave to defendant the $2,000.00 cash after the crimes were committed. Two thousand dollars is a handsome reward for the routine information of the state licensing office and the requirements for obtaining a driver's license, but this evidence is sufficient only to create a suspicion that defendant and the perpetrators conspired to commit the offenses, or that the sum was paid to defendant as "hush money." Mere concealment of knowledge that a felony is to be committed does not make the party concealing it an accessory before the fact. 21 Am. Jur. 2d, Criminal Law, § 124.

The Supreme Court of North Carolina and this Court have held in many cases that evidence which raises no more than a surmise or conjecture of guilt is insufficient to overrule nonsuit, and there must be legal evidence of each fact necessary

to support conviction. 2 Strong, N. C. Index 2d, Criminal Law, § 106.

Defendant's motion for judgment of nonsuit on both charges should have been allowed.

Reversed.

Judge BRITT concurs.

Judge PARKER dissenting.

In my view the State's evidence was sufficient to carry the case to the jury on the charge that defendant was an accessory before the fact to the crimes described in the indictment. Evidence presented by the State shows the following:

1. Busby and McVey went to defendant in the last week of November 1973 and told him they needed to get a North Carolina driver's license in a fictitious name in order to cash checks;
2. Defendant gave them directions to the license bureau and instructed them that in order to get the licenses they needed to take a written test and show identification;
3. Defendant loaned the men a car to drive to the license bureau;
4. At the license bureau, Busby obtained a North Carolina driver's license in the name of Irvin R. Squires and McVey obtained a North Carolina driver's license in the name of Hugh C. Harrison;
5. On 27 November 1973, Busby filled out a check in the name of E. E. Boone, Jr. as maker. The next day McVey cashed this check on 28 November 1973 at the First Union National Bank in Greensboro, signing the name Hugh C. Harrison and presenting his North Carolina driver's license in the name of Hugh C. Harrison;
6. Defendant personally received $2,000 in cash from the two men upon their return from cashing the checks;
7. When Busby relayed his worry to defendant that a patrolman had taken down the license plate number of their car while at the license bureau, defendant told him "not to worry about anything, that if anybody came by, he'd cover up for [him]."
8. Some days later, defendant called Busby to inform him that the police "know who you are" and advised him to get out of town.

One is guilty as an accessory before the fact if he shall "counsel, procure or command any other person to commit any felony." G.S. 14-5. The term "counsel" is frequently used in criminal law to "describe the offense of a person who, not actually doing the felonious act, by his will contributed to it or procured it to be done." *State v. Bass*, 255 N.C. 42, 51, 120 S.E. 2d 580, 586 (1961). Although defendant was not the originator of the criminal activities disclosed in this case, the above facts tend to show that, with full knowledge of what was going on, he actively contributed to the criminal activities of Busby and McVey by giving them advice on how to accomplish a key step in their unlawful scheme and by furnishing them transportation for that purpose. "To render one guilty as an accessory before the fact, he must have had the requisite criminal intent; and it has been said that he must have the same intent as the principal. It is well settled, however, that he need not necessarily have intended the particular crime committed by the principal; an accessory is liable for any criminal act which in the ordinary course of things was the natural or probable consequence of the crime that he advised or commanded." 22 C.J.S., Criminal Law, § 92, p. 271. Thus, the defendant in this case, just as did the defendant in *State v. Bass, supra*, with full knowledge of the other men's intentions, gave both advice and assistance "in regard to and in furtherance of the proposed line of conduct and thereby contributed to it." *State v. Bass, supra*, p. 51.

In my view the State's evidence was sufficient to make out a prima facie case of counseling the commission of the felonies charged, and I would find no error in submitting the case to the jury.

STATE OF NORTH CAROLINA v. SEARS WILLIAM SAULS

No. 54

(Filed 7 December 1976)

1. Criminal Law § 10— accessory before the fact — elements

The elements necessary to be proved under G.S. 14-5 in order to sustain a conviction for accessory before the fact are: (a) that defendant counseled, procured or commanded the principal to commit the offense; (b) that defendant was not present when the principal committed the offense; and (c) that the principal committed the offense.

2. Forgery § 2— accessory before the fact to forgery — sufficiency of evidence

Evidence was sufficient to withstand a motion for nonsuit on defendant's charges of accessory before the fact to forgery and to the uttering of forged instruments where it tended to show that two men went to defendant and told him they needed to get N. C. driver's licenses in fictitious names in order to cash stolen checks; defendant gave them directions to the license bureau and instructed them that, in order to get licenses, they would be required to take a written test and show identification; defendant loaned the men a car to drive to the license bureau; the men obtained the licenses and forged and cashed checks using the licenses; defendant personally received $2000

in cash from the men in return for the checks which were forged and cashed; one of the men stated to police that a third man provided fictitious identification cards and the stolen blank checks for $3000 "plus taking care of [defendant] with some of the money from the cashing of the blank checks in N. C."; when one of the men relayed his worry to defendant that a patrolman had taken down the license plate number of their car while at the license bureau, defendant told him "not to worry about anything, that if anybody came by, he'd cover up for [him]"; and some days later, defendant called one of the men to inform him that the police knew who he was and advised him to get out of town.

3. Criminal Law § 73— hearsay testimony — definition

To be hearsay, evidence must be offered to prove the truth of what the declarant said, and it is not hearsay if offered only to prove that the declarant made the statement or for any other purpose.

4. Criminal Law § 102— statement of district attorney — no motion to strike — no prejudice to defendant

Defendant was not prejudiced where the district attorney stated that "this is where perhaps a voir dire would be appropriate to establish conspiracy," defendant requested that the jury be instructed to disregard the statement, there was a conference at the bench, the request for the jury instruction was not renewed, and defendant made no motion to strike.

5. Criminal Law § 89— corroborative statement — failure to request limiting instruction

The trial court did not err in allowing a witness's written statement to be introduced into evidence over defendant's general objection, since defendant failed to request an instruction restricting the consideration of the statement to corroboration of the witness's testimony.

6. Criminal Law § 131— incompetent and immaterial evidence — new trial on ground of newly discovered evidence properly denied

In a prosecution for accessory before the fact to forgery and uttering forged checks, defendant was not entitled to a new trial based upon newly discovered evidence which consisted of (1) testimony by a polygraph expert concerning results of tests administered defendant and (2) testimony by a witness who stated that she had cashed some of the forged checks for the principals, since the first would have been incompetent in a new trial and the second would have been immaterial.

7. Criminal Law § 134— prayer for judgment continued — sentencing at subsequent term of court proper

Where the trial judge after verdict ordered that prayer for judgment be continued until the next criminal term, and the presiding judge at that term conducted a hearing before entering judgment that defendant be imprisoned for three years, such sentence was properly imposed.

APPEAL by the State pursuant to G.S. 7A-30(2) from the decision of the Court of Appeals, reported in 29 N.C. App. 457,

224 S.E. 2d 702 (1976), which reversed the conviction of the defendant before *Collier, J.*, at the 5 May 1976 Criminal Session of GUILFORD Superior Court.

Defendant was tried on an indictment, proper in form, with the offenses of forgery and uttering a forged instrument. He was convicted as an accessory before the fact to forgery and an accessory before the fact to uttering a forged instrument. From judgment imposing a prison sentence, defendant appealed. The Court of Appeals held that there was not sufficient evidence to go to the jury and reversed. One member of the panel dissented, and the State appealed. Defendant, by his brief, brought forward other assignments of error not passed upon by the Court of Appeals.

The State's evidence tended to show that Edward George Busby and Ronald McVey purchased some sto'en checks and fictitious credit cards from a man named Frasier in Portsmouth, Virginia. Some of the checks had been stolen from a law firm in Greensboro, North Carolina, and others from a construction company. At the time of the purchase of the checks (on or about 1 November 1973), Frasier told the men to go see defendant in Greensboro for help in getting North Carolina driver's licenses for use in cashing the checks.

Busby and McVey went to Greensboro during the last week of November and located defendant, whom Busby had known for over a year. The men told defendant that they needed a car in which to take a driver's test to secure driver's licenses in the fictitious names shown on the credit cards. They told defendant that they needed the identification to enable them to cash stolen checks. Defendant loaned them a car from the car lot at which he was employed and gave the men directions to the license bureau. Busby and McVey successfully procured North Carolina driver's licenses in the fictitious names shown on the credit cards. When they returned from the license bureau, Busby stated to defendant that he was concerned because the highway patrolman who administered the driving test had taken down the license number of the car. Defendant told Busby that if anything ever came of it he would "cover up" for Busby.

Busby and McVey then began cashing forged checks throughout Greensboro, using the North Carolina driver's licenses for identification. After several days, the two men returned to the car lot where defendant was employed and

purchased and paid cash for two cars from defendant. At this time, McVey placed an additional $2,000 in defendant's pocket which, as stated by McVey, was "in return for these checks." Busby stated to the police: "The price for this [the identification cards and checks from Frasier] was $3,000.00 plus taking care of Sears Sauls with some of the money from the cashing of the blank checks in North Carolina."

On or about 11 December 1975, defendant phoned Busby and told him that the FBI had been making an investigation concerning the vehicle which defendant had loaned Busby and McVey. Defendant further stated that the FBI knew who they were and that the two men had "better split."

Defendant did not testify but offered evidence tending to show that he was employed by Leith Lincoln-Mercury and that he sold two cars to two gentlemen for cash. He also offered testimony that it was not unusual for a car from this lot to be loaned to an individual. Defendant further introduced testimony tending to show he was a man of good character.

Other facts necessary to the decision of this case will be discussed in the opinion.

Attorney General Rufus L. Edmisten and Assistant Attorney General Archie W. Anders for the State appellant.

William C. Ray for defendant appellee.

MOORE, Justice.

Defendant strongly contends that the Court of Appeals correctly held that a nonsuit should have been granted in this case. The basis of this contention is that the evidence is insufficient to show that defendant is an accessory before the fact to the crimes of forgery and uttering forged instruments.

G.S. 14-5, in pertinent part, provides:

> "If any person shall counsel, procure or command any other person to commit any felony . . . the person so counseling, procuring or commanding shall be guilty of a felony, and may be indicted and convicted . . . as an accessory before the fact to the principal felony. . . . "

[1] In *State v. Bass*, 255 N.C. 42, 120 S.E. 2d 580 (1961), this Court analyzed the elements necessary to be proved under G.S.

14-5 in order to sustain a conviction for accessory before the fact. These elements were: (a) that under G.S. 14-5 defendant counseled, procured or commanded the principal to commit the offense; (b) that defendant was not present when the principal committed the offense; and (c) that the principal committed the offense.

In *Bass*, the Court further stated:

> "To render one guilty as an accessory before the fact to a felony he must counsel, incite, induce, procure or encourage the commission of the crime, so as to, in some way, participate therein by word or act. . . . It is not necessary that he shall be the originator of the design to commit the crime; it is sufficient if, with knowledge that another intends to commit a crime, he encourages and incites him to carry out his design. . . . " 255 N.C. at 51-52, 120 S.E. 2d at 587. *See also State v. Branch*, 288 N.C. 514, 220 S.E. 2d 495 (1975); *State v. Spicer*, 285 N.C. 274, 204 S.E. 2d 641 (1974).

[2] Under the principles stated in *State v. Bass, supra*, we hold that there is sufficient evidence to withstand a motion for nonsuit on defendant's charges of accessory before the fact to forgery and to the uttering of forged instruments. A motion to nonsuit is properly denied if there is any competent evidence which will support the charges contained in the bill of indictment or warrant, considering the evidence in the light most favorable to the State and drawing every reasonable inference, deducible from the evidence, in favor of the State. *See also State v. Bell*, 285 N.C. 746, 208 S.E. 2d 506 (1974); 4 Strong, N. C. Index 3d, Criminal Law § 106 (1976).

In present case, evidence for the State tends to show the following:

1. Busby and McVey went to defendant in the last week of November 1973 and told him they needed to get a North Carolina driver's license in a fictitious name in order to cash stolen checks.

2. Defendant gave Busby and McVey directions to the license bureau and instructed them that in order to get the licenses, they would be required to take a written test and show identification.

3. Defendant loaned the men a car to drive to the license bureau.

4. At the license bureau, Busby obtained a North Carolina driver's license in the name of Irvin R. Squires and McVey obtained a North Carolina driver's license in the name of Hugh C. Harrison.

5. On 27 November 1973, Busby filled out a check in the name of E. E. Boone, Jr., a member of the law firm from which the checks had been stolen, as maker. The next day McVey cashed this check at the First Union National Bank in Greensboro, signing the name Hugh C. Harrison and presenting his North Carolina driver's license in the name of Hugh C. Harrison.

6. Defendant personally received $2,000 in cash from Busby and McVey in return for the checks which were forged and cashed.

7. Busby stated to the police: "The price for this [the identification cards and checks from Frasier] was $3,000.00 plus taking care of Sears Sauls with some of the money from the cashing of the blank checks in North Carolina."

8. When Busby relayed his worry to defendant that a patrolman had taken down the license plate number of their car while at the license bureau, defendant told him "not to worry about anything, that if anybody came by, he'd cover up for [him]."

9. Some days later, defendant called Busby to inform him that the police "know who you are" and advised him to get out of town.

Considering the facts outlined above, it is established for the purpose of a motion for nonsuit: (a) that defendant was not present at the time of the forgery and uttering of the instruments; (b) that Busby and McVey in fact committed the crimes of forgery and uttering as principals; and (c) that defendant by his acts encouraged, participated in, and contributed to the commission of the crimes. We hold, therefore, that there was ample evidence to go to the jury.

[3] We turn now to the other assignments of error brought forward by defendant. He first argues that certain testimony

admitted at trial was hearsay and prejudicial. As is stated in 1 Stansbury, N. C. Evidence § 138 (Brandis Rev. 1973):

> "[W]henever the assertion of any person, other than that of the witness himself in his present testimony, is offered to prove the truth of the matter asserted, the evidence so offered is hearsay. If offered for any other purpose, it is not hearsay."

This is the general rule and has been applied by this Court in cases too numerous to list. To be hearsay, the evidence must be offered to prove the truth of what the declarant said. The evidence is not hearsay if offered only to prove that the declarant made the statement or for any other purpose. *State v. Bryant*, 283 N.C. 227, 195 S.E. 2d 509 (1973); *State v. Griffis*, 25 N.C. (3 Ired.) 504 (1842).

Defendant makes numerous assignments of error to testimony which he contends was hearsay. We find no merit in these contentions. In most instances, the witness was testifying as to what he personally saw or what he said to someone else. This a witness may properly do.

Defendant strenuously argues that witnesses Busby and McVey should not have been permitted to testify that they told defendant that Frasier had sent them to see defendant. As stated in *State v. Dilliard*, 223 N.C. 446, 447, 27 S.E. 2d 85, 86 (1943): "This was a statement made to defendant in explanation of the visit by prosecutrix. Its probative force does not depend, in whole or in part, upon the competency and credibility of any person other than the witness. [Citations omitted.]" *See also State v. Miller*, 282 N.C. 633, 194 S.E. 2d 353 (1973). Likewise, in present case, the testimony by Busby and McVey was merely an explanation of why they had come to see defendant. The probative force of the evidence depended upon the credibility of witnesses Busby and McVey, not Frasier. Thus, these assignments are overruled.

[4] During the trial, the following exchange took place:

> "Q. When you indicated that you were going to buy the checks, what did he say?
>
> MR. RAY: OBJECTION.
>
> THE COURT: Who are you talking about—he?
>
> MR. IDOL: Referring to Mr. Frasier.

> THE COURT: SUSTAINED.
>
> MR. IDOL: Your Honor, this is where perhaps a voir dire would be appropriate to establish conspiracy.
>
> MR. RAY: I respectfully move that the jury be instructed to disregard his statement."

Following a conference at the bench, no further requests was made by defendant for an instruction to the jury to disregard the comment and defendant did not make a motion to strike the statement made by the district attorney.

In *State v. Gainey*, 280 N.C. 366, 185 S.E. 2d 874 (1971), defendant stated that a witness was not in court and would not testify because "he didn't want to come to court." The prosecutor then asked the question: "He didn't want to go on the stand and perjure himself, did he?" Defendant did not object to the statement and made no motion to strike the statement. This Court held that the solicitor's question was objectionable, but further stated: "However, it is inconceivable that it affected the outcome of the case, and under all the circumstances, it cannot be held prejudicial error. [Citations omitted.]" 280 N.C. at 374, 185 S.E. 2d at 880. In instant case, defendant lodged an objection to the solicitor's request. However, he did not make a motion to strike. After a conference at the bench, the request for the jury instruction was not renewed. Further, we do not feel that the statement was prejudicial to defendant. It is not sufficient grounds for a new trial that there is an error in the trial, "unless . . . it appears that there is a reasonable basis for the belief that, had this error not been committed, a different verdict would have been rendered." *State v. Turner*, 268 N.C. 225, 233, 150 S.E. 2d 406, 412 (1966). In the case at bar, there was more than sufficient evidence to convict defendant and the district attorney's comment could not have any material effect upon the verdict reached by the jury. Thus, we find no merit in this assignment.

[5] During his testimony, witness Busby read to the jury a written statement which he had previously made to police concerning the forgery and uttering of the checks. He testified that to the best of his knowledge the statement was true. His testimony on the stand was in substantial agreement with the written statement. Over a general objection, the written statement was introduced into evidence. Defendant contends this was error.

A prior consistent statement of the witness to strengthen his credibility is admissible. "And it makes no difference, in this State at least, whether such evidence appears in a verbal or written statement, nor whether verified or not." *Bowman v. Blankenship*, 165 N.C. 519, 522, 81 S.E. 746, 747 (1914). *See also* 1 Stansbury, N. C. Evidence § 51 (Brandis Rev. 1973), and cases cited therein.

When a defendant does not specifically request an instruction restricting the use of evidence which corroborates the testimony of a witness, the admission of the evidence and the failure of the trial judge to give a limiting instruction is not error. *State v. Bryant*, 282 N.C. 92, 191 S.E. 2d 745 (1972); *State v. Corl*, 250 N.C. 252, 108 S.E. 2d 608 (1959); *State v. Lee*, 248 N.C. 327, 103 S.E. 2d 295 (1958).

In *State v. Sawyer*, 283 N.C. 289, 297, 196 S.E. 2d 250, 255 (1973), statements made by the witness Ward were admitted over defendant's general objection and were introduced to corroborate the witness's testimony. In *Sawyer*, Chief Justice Bobbitt stated:

> " 'The general admission of evidence competent for a restricted purpose will not be held reversible error in the absence of a request at the time that its admission be restricted.' 7 Strong N. C. Index 2d, Trial § 17. See also Rule 21, Rules of Practice in the Supreme Court, 254 N.C. 783, 803. Obviously, the testimony to which these assignments refer was offered as tending to corroborate the testimony of Ward. Undoubtedly, if defendant had so requested, the trial judge would have given an explicit instruction to the effect that this evidence was competent for consideration only as corroborative testimony."

Although Rule 21, relied upon in *Sawyer*, has been superseded, we feel that the comment of Dean Brandis is instructive:

> "The new Rules of Appellate Procedure supersede but contain nothing comparable to former Rule 21. . . . However, existing case law rather clearly indicates that the disappearance of Rule 21 will work no change." 1 Stansbury, N. C. Evidence § 52 at 52, n. 59 (Brandis Rev. Supp. 1976).

In the case at bar, defendant failed to request a limiting instruction when the corroborative written statement was admitted. Therefore, this assignment is overruled.

Defendant assigns as error the trial court's denial of his motion to set aside the verdict as against the greater weight of the evidence. Such motion is addressed to the sound discretion of the trial court and its refusal to grant the motion is not reviewable on appeal. *State v. Mason*, 279 N.C. 435, 183 S.E. 2d 661 (1971); *State v. Bridgers*, 267 N.C. 121, 147 S.E. 2d 555 (1966); *State v. Wagstaff*, 219 N.C. 15, 12 S.E. 2d 657 (1941). This assignment of error is therefore without merit.

[6] After verdict, but before sentence was imposed, defendant moved to set aside the verdict based upon newly discovered evidence. Apparently, defendant intended to move for a new trial based upon this newly discovered evidence. The prerequisites for such motions are set out by Stacy, Chief Justice, in the oft-cited case of *State v. Casey*, 201 N.C. 620, 161 S.E. 81 (1931). *See also State v. Beaver*, 291 N.C. _ _, _ _ S.E. 2d _ _ (1976). One prerequisite is that the newly discovered evidence be competent, material, and relevant.

Defendant, in support of his motion, first offered the testimony of an expert in the field of polygraph. This witness testified that he gave defendant a lie detector test and that this test showed defendant was telling the truth when he testified he did not receive $2,000 from Busby or McVey for assisting them in obtaining North Carolina identification. The witness further testified that the test also showed that defendant was telling the truth when he said that he did not in any way help Busby or McVey obtain North Carolina identification for illegal purposes.

Charlene Handy, the other witness who testified at the hearing on this motion, stated that she had entered a plea of guilty for cashing some of the forged checks for Busby and McVey. She further testified that she did not know Frasier and that she did not know that there was a case against defendant until she read about it in the Greensboro newspaper.

The testimony concerning the lie detector examination would not have been competent. *State v. Jackson*, 287 N.C. 470, 215 S.E. 2d 123 (1975); *State v. Brunson*, 287 N.C. 436, 215 S.E. 2d _ (1975); *State v. Foye*, 254 N.C. 704, 120 S.E. 2d 169 (1961). The testimony of Charlene Handy was immaterial and it could not have affected the verdict. Moreover, a motion for a new trial on the ground of newly discovered evidence is addressed to the sound discretion of the trial judge and the re-

fusal to grant the motion is not reviewable in the absence of an abuse of discretion. *State v. Morrow*, 264 N.C. 77, 140 S.E. 2d 767 (1965); *State v. Dixon*, 259 N.C. 249, 130 S.E. 2d 333 (1963); *State v. Williams*, 244 N.C. 459, 94 S.E. 2d 374 (1956). No abuse of discretion appears on this record. This assignment is overruled.

[7] After verdict, the trial judge, Judge Collier, ordered that prayer for judgment be continued until 7 July 1975, the next criminal term. On 7 July 1975, Judge Lupton, the presiding judge, conducted a hearing and then entered judgment that defendant be imprisoned for a term of three years in the State Prison. Defendant contends it was error for Judge Lupton, who was not the trial judge, to pronounce judgment. In support of this contention, defendant's counsel, in his brief, states: "Counsel is frank to admit that after carefully researching the law in this case, he has found no authority to support this position." This Court considered a similar contention in *State v. Graham*, 225 N.C. 217, 34 S.E. 2d 146 (1945). In that case, defendant had been tried before Burney, J., at the January 1944 Term of Bladen Superior Court. Prayer for judgment was continued and defendant was sentenced by Nimocks, J., at the January 1945 Term of Bladen Superior Court. The judgment discloses that Judge Nimocks heard evidence before imposing sentence. Defendant contended that the court, having failed to pronounce judgment at the January Term 1944, at which the defendant was convicted, was without jurisdiction to impose a sentence at a subsequent term. This Court held otherwise, stating:

> "In the absence of a statute to the contrary, sentence does not necessarily have to be imposed at the same term of court at which the verdict or p'ea of guilty was had, and courts of general jurisdiction, having stated terms for the trial of criminal actions, have the power to continue the case to a subsequent term for sentence.
>
> * * *
>
> " . . . It is sometimes found to be expedient, if not necessary, to continue a prayer for judgment and when no conditions are imposed, the judges of the Superior Court may exercise this power with or without the defendant's consent. [Citation omitted.]" 225 N.C. at 219, 34 S.E. 2d at 147. *See also State v. Thompson*, 267 N.C. 653, 148 S.E. 2d 613 (1966).

In the case at bar, Judge Lupton conducted an extensive hearing before passing sentence. He heard the statement made by Busby to the officers and other testimony for the State. Several witnesses, including the defendant, testified in defendant's behalf. Defendant denied accepting any money from Busby or McVey, or in any manner assisting them in obtaining fictitious driver's licenses or in the cashing of forged checks. Further, evidence was introduced that defendant was on federal probation, having been convicted in two cases involving the interstate transportation of a stolen motor vehicle. His probation officer testified concerning defendant's good behavior while on probation. Other witnesses testified as to defendant's good character.

We hold that the sentence, which was determined after hearing, and was within the limits prescribed by statute, was properly imposed by Judge Lupton.

A careful review of the entire record discloses no prejudicial error in the trial in the superior court. The decision of the Court of Appeals is therefore reversed.

Reversed.